

**Matter of City of New York v New York City Civ.
Serv. Commn.**

2014 NY Slip Op 31763(U)

July 10, 2014

Supreme Court, New York County

Docket Number: 400863/2013

Judge: Doris Ling-Cohan

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

Index Number : 400863/2013
CITY OF NEW YORK
vs
NYC CIVIL SERVIC COMMISSION
Sequence Number : 001
ARTICLE 78

PART 36

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for Article 78 proceeding
Notice of Motion/Order to Show Cause — Affidavits — Exhibits (4 memo) | No(s) 1, 2
Answering Affidavits — Exhibits (4 memo) | No(s) 3
Replying Affidavits _____ | No(s) 4


Upon the foregoing papers, it is ordered that this motion is Article 78 proceeding
is denied and dismissed in
accordance with the attached
memorandum decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 7/10/14

 _____, J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

* 2]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 36

-----X
In the Matter of the Application of
The City of New York, Edna Wells
Handy, as Commissioner of the
New York City Department of Citywide
Administrative Services, and
Raymond W. Kelly, as Commissioner
of the New York City Police
Department,

Petitioners,

For a Judgment Pursuant to
Article 78 of the Civil Practice
Law and Rules

-against-

The New York City Civil Service
Commission and Reginald LeRouge,

Respondents.

-----X
Doris Ling-Cohan, J.:

Petitioners seek an order setting aside a determination (the Determination) of the New York City Civil Service Commission (the Commission) dated January 29, 2013 that reversed a decision (the Decision) of the New York City Police Department (the NYPD) dated March 11, 2011 that found that Reginald LeRouge (LeRouge) had "not met the requirements for the position of Police Officer . . . and [was, therefore,] disqualified."

Procedural Background and Underlying Facts

On or about October 18, 2008, LeRouge took civil service

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001

examination number 8050 (the Exam) for the position of Police Officer (petition, ¶ 12). Part of the Exam's requirements included medical and psychological examinations to determine fitness to serve. In February and March 2010, LeRouge was given psychological tests by Heather Jonas (Jonas), a staff psychologist from the NYPD (*id.*, ¶ 16). On February 2, 2011, Jonas issued a Candidate Psychological Disqualification Summary (the Jonas Report), finding that LeRouge was "psychologically unsuitable" due to "anxiety . . . , especially under times of stress" (*id.*, ¶ 17). On March 11, 2011, the NYPD sent LeRouge the Decision, which found that he was disqualified, implicitly based upon the Jonas Report (*id.*, ¶ 22). On March 23, 2011, LeRouge appealed the Decision to the Commission and the NYPD sent the record of LeRouge's psychological examination to his doctor, Ashraf Elshafei (Elshafei) (*id.*, ¶ 32). Elshafei issued a report dated June 27, 2011 (the First Elshafei Report), which stated that LeRouge had an "[a]djustment disorder with anxious mood" and recommended that LeRouge continue treatment (*id.*, ¶¶ 33-36).

On September 8, 2011, Dr. Robert Arko, an appeals consultant, recommended affirming the Decision, which disqualified LeRouge, and on September 22, 2011, the disqualification was sustained (*id.*, ¶¶ 37-40). The appeal of this action was scheduled for September 18, 2012, and after adjournment at LeRouge's request, the NYPD moved to dismiss the

appeal as abandoned (*id.*, ¶¶ 41-43). In his opposition, LeRouge presented a new report from Elshafei dated July 14, 2012 (the Second Elshafei Report), which omitted the notation of anxiety mentioned in the First Elshafei Report (*id.*, ¶ 45). The Commission denied dismissal of the appeal, and on January 23, 2013, it held a hearing (the Hearing) (*id.*, ¶¶ 45, 47, 49).

At the Hearing, LeRouge offered testimony from another psychologist, Robert Daley, who had issued a report dated November 30, 2012 (the Daley Report). The NYPD objected to consideration of the Second Elshafei Report and the Daley Report, since they were received after the sustaining of the Decision by the NYPD's internal appeals process (Hearing at 6-7). The NYPD's objections were overruled and the Commission heard testimony from Jonas, LeRouge and Daley (petition, ¶¶ 49-51).

On January 29, 2013, the Commission issued the Determination, finding that the NYPD had not provided LeRouge "with a written statement of the reasons for his disqualification before the final disqualification was issued . . . [and] that this deprived him of the opportunity to make [an] explanation . . . [and that the record [presented to the Commission was] not sufficient to support a disqualification due to anxiety, poor stress tolerance, lack of credibility and confusion" (Determination at 2, 3).

On May 29, 2013, petitioners commenced this proceeding

seeking to set aside the Determination. Petitioners assert that the Commission exceeded its authority as an appeals board by conducting a de novo review and considering additional evidence, and that the Determination was arbitrary and capricious, since the NYPD had a rational basis for the Decision that LeRouge was psychologically unsuitable due to anxiety, as evinced by the Jonas Report.

Arbitrary and Capricious

In reviewing an administrative agency's determination as to whether it is arbitrary and capricious under CPLR Article 78, the test is whether the determination "is without sound basis in reason and . . . without regard to the facts" (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]; *Matter of Kenton Assoc. v Division of Hous. & Community Renewal*, 225 AD2d 349, 349 [1st Dept 1996]).

The court may not weigh conflicting choices by the administrative agency, if the agency's determination has a basis in reason (*Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d 425, 429 [1st Dept 2007], *affd* 11 NY3d 859 [2008]). If "a rational basis exists [for the agency's determination], a court may not substitute its judgment for that of the agency . . .; indeed, an agency's determination, acting pursuant to legal authority and

within its area of expertise, is entitled to deference" (*Matter of Tockwotten Assoc. v New York State Div. of Hous. & Community Renewal*, 7 AD3d 453, 454 [1st Dept 2004] [citations omitted]).

"[E]ven if different conclusions could be reached . . . , a court may not substitute its judgment for that of the agency [if there is a rational basis for the Determination]" (*Partnership 92 LP*, 46 AD3d at 429; see also *Awl Indus., Inc. v Triborough Bridge & Tunnel Auth.*, 41 AD3d 141, 142 [1st Dept 2007]).

"'An appointing authority has wide discretion in determining the fitness of candidates . . . particularly . . . in the hiring of law enforcement officers' . . . [and] '[i]n determining whether a candidate is medically qualified . . . , the appointing authority is entitled to rely upon the findings of its own medical personnel, even if those findings are contrary to those of professionals retained by the candidate'" (*Matter of City of New York v New York City Civ. Serv. Commn.*, 61 AD3d 584, 584-585 [1st Dept 200] [internal citations omitted]; see also *Matter of Thomas v Straub*, 29 AD3d 595, 596 [2d Dept 2006]).

In the case of police officers, the New York City Department of Citywide Administrative Services (DCAS) "has delegated its powers . . . [to investigate and determine] to the [NYPD], thus giving [the NYPD] the authority to disqualify [a candidate] . . . [and the Commission] is not empowered to decide the matter de

novo" (*Matter of City of New York v New York City Civ. Serv. Commn.*, 20 AD3d 347, 348 [1st Dept 2005]). Rather, the Commission acts as "an appeals board . . . [and] it is limited to affirming, modifying or reversing a determination . . . [and] [t]he issue presented for the [Commission's] consideration was thus limited to whether there was a rational basis to support the [NYPD's] determination" (*id.*; see also *Matter of Department of Personnel of City of N.Y. v New York City Civ. Serv. Commn.*, 79 NY2d 806, 807 [1991]). However, where the hearing before the Commission is held and the NYPD fails to object to the Commission's decision to hold a de novo hearing "DCAS cannot now complain that the Commission had no power to decide the matter de novo . . . [and the sole question [becomes] whether the Commission's . . . determination was rational" (*Matter of City of New York v New York City Civ. Serv. Commn.*, 6 NY3d 855, 858 [2006]; *Matter of Garayua v New York City Police Dept.*, 68 NY2d 970, 972 [1986]; *Matter of City of New York v New York City Civ. Serv. Commn.*, 40 AD3d 325, 326 [1st Dept 2007])).

Discussion

Petitioners contend that the Commission did not act as "an appeals board . . . [and limit its Determination] to whether there was a rational basis to support the [NYPD's Decision]" (*City of New York*, 20 AD3d at 348). They also assert that in basing the Decision upon the Jonas Report, the Decision had "a

rational basis" and should have been sustained and, accordingly, that the Commission's Determination was arbitrary and capricious (id.).

It is clear that the Commission did not act as an appeals board and that it conducted a de novo hearing. However, where the hearing before the Commission is held and the NYPD fails to object to the Commission's decision to hold a de novo hearing, "DCAS [and the NYPD] cannot now complain that the Commission had no power to decide the matter de novo . . . [and the sole question becomes] whether the Commission's . . . decision was rational" (*City of New York*, 6 NY3d at 858; *City of New York*, 40 AD3d at 326). In the Hearing, the NYPD objected to consideration of the Second Elshafei and the Daley Reports (Hearing at 6-7). Significantly, however, it did not object to the Commission hearing testimony from Jonas, LeRouge and Daley, and the NYPD's attorney cross-examined these witnesses. Thus, the NYPD must be considered to have "participated without objection in the de novo evidentiary hearing" and consequently, "the sole question . . . is whether the Commission's [Determination] was rational" (*City of New York*, 30 AD3d at 228, quoting *City of New York*, 6 NY3d at 858). The Determination "had a rational basis in the testimony of the individual respondent and his psychologist, as well as documents in the record [, and since] [t]he Commission heard and saw the witnesses . . . [, it] was in the best position to judge

their credibility" (*City of New York*, 40 AD3d at 326). Therefore, the petition must be dismissed.

Order

It is, therefore,

ORDERED and ADJUDGED that the petition is denied and the proceeding is dismissed; and it is further

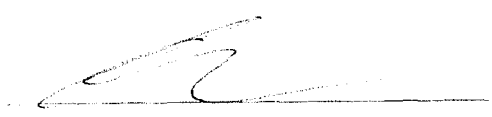
ORDERED that petitioners shall implement the decision of the Commission dated January 29, 2013 forthwith; and it is further

ORDERED that within 30 days of entry of this order, respondents shall serve a copy upon petitioners, with notice of entry.

Dated: July 10, 2014

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).



Doris Ling-Cohan, J.S.C.